IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BRIAN MCGOLDRICK, et al.,	)	
Plaintiffs,	)	**CIVIL ACTION**
v.	)	**No. 04-3125-CM**
ROGER WERHOLTZ,	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter comes before the court on plaintiffs Brian McGoldrick, Todd Pabst, Marcus Washington and Jeffrey Sperry's Motion to Alter or Amend Judgment (Doc. 40), and plaintiff Brian McGoldrick's separate Motion to Reopen Case and/or Motion for Ruling (Doc. 42).

I. Background

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983 on April 20, 2004, contending that defendant had violated their First and Fourteenth Amendment rights. Plaintiffs contend that defendant violated their First and Fourteenth Amendment rights by banning all sex and nudity related materials pursuant to the Kansas Department of Corrections' (KDOC) amended Kansas Administrative Regulation (KAR) 44-12-313. Plaintiffs also contend that defendant violated their Fourteenth Amendment rights by placing ten percent of all monies received by them into mandatory savings accounts. On March 23, 2005, the court granted defendant's summary judgment motion and dismissed plaintiffs' case without prejudice. Specifically, the court found that plaintiffs had failed to exhaust all available administrative remedies with respect to some of the claims in their complaint as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. §

1997e(a), before filing an action with respect to prison conditions under § 1983. Plaintiffs filed the instant Motion to Alter or Amend Judgment on April 5, 2005. On August 16, 2005, plaintiff McGoldrick filed a motion requesting that the court rule on the motion to alter the judgment and/or reopen the case.

II. Standard for Motion to Reconsider

Whether to grant or deny a motion for reconsideration is committed to the court's discretion. *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996); *Hancock v. City of Okla. City*, 857 F.2d 1394, 1395 (10th Cir. 1988). In exercising that discretion, courts have recognized three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *See Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981); *Burnett v. W. Res., Inc.*, 929 F. Supp. 1349, 1360 (D. Kan. 1996); *Marx v. Schnuck Mkts., Inc.*, 869 F. Supp. 895, 897 (D. Kan. 1994).

> Appropriate circumstances for a motion to reconsider are where the court has obviously misapprehended a party's position or the facts or the law, or the court has mistakenly decided issues outside of those the parties presented for determination. A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider.

Burnett, 929 F. Supp. at 1360 (citing *Anderson v. United Auto Workers*, 738 F. Supp. 441, 442 (D. Kan. 1990); *Renfro v. City of Emporia, Kan.*, 732 F. Supp. 1116, 1117 (D. Kan. 1990)). Moreover, "[a] motion to reconsider is not a second chance for the losing party to make his strongest case or to dress up arguments that previously failed." *Flake v. Hoskins*, 55 F. Supp. 2d 1196, 1203-04 (D. Kan. 1999).

III. Analysis

Although the court finds that plaintiffs' motion to alter the judgment (a motion for reconsideration) does not meet any of the three grounds that justify reconsideration, the court takes this opportunity to address plaintiffs' arguments in favor of reconsideration. Plaintiffs essentially raise two arguments: (1) that the court should not have dismissed the entire complaint because at least one plaintiff (Sperry) exhausted administrative remedies on the Fourteenth Amendment claim regarding the mandatory savings accounts, and all plaintiffs exhausted their administrative remedies on the First and Fourth Amendment claim regarding the ban on materials containing sex and nudity; and (2) that it would be futile for all plaintiffs to exhaust their administrative remedies on the mandatory savings account claim because there is no reason to expect that defendant would change his position with regard to the issue.

With regard to plaintiffs' first argument, the court notes that the Tenth Circuit has specifically held that:

> [U]nless ***all*** available remedies are exhausted for ***all*** of the claims in a *Bivens* action, the action must be dismissed. Therefore, in accordance with this total exhaustion requirement, [plaintiffs] must demonstrate that all prison grievance complaints covered by [their] action have been administratively exhausted. The inclusion of any unexhausted claims is sufficient grounds for the dismissal of the entire action under the total exhaustion requirement.

Steele v. Fed. Bureau of Prisons, 100 Fed. Appx. 773, 775 (10th Cir. 2004) (emphasis added) (citing *Ross v. County of Bernalillo*, 365 F.3d 1181, 1190 (10th Cir. 2004); *Graves v. Norris*, 218 F.3d 884, 885 (8th Cir. 2000)). Accordingly, the court's finding that not all of the plaintiffs exhausted their administrative remedies with regard to the mandatory savings account claim warranted dismissal of the entire complaint under the total exhaustion requirement of the PLRA.[1]

[1] Plaintiffs also appear to argue that the mandatory savings account claim could be limited only to plaintiff Sperry. However, plaintiffs' complaint clearly states that defendant has violated the Fourteenth Amendment rights of all of the plaintiffs by allegedly improperly seizing their money, and plaintiffs have

Second, the court finds plaintiffs' futility argument unpersuasive. The Supreme Court has not included "futility or other exceptions" into the PLRA's exhaustion requirement. *See Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001). "Congress ha[s] eliminated both discretion to dispense with administrative exhaustion and the condition that it be 'plain, speedy, and effective.'" *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002) (quoting *Booth*, 532 U.S. at 739).

> The exhaustion mandate applies even if a prisoner "understood that the claims put forth in [their] complaint were 'non-grievable' under the prison policy," or if [they] felt that a prison official's statement "frustrated [their] ability to proceed with administrative remedies."

Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1214 (10th Cir. 2003) (internal citations omitted) (citing *Beaudry v. Corr. Corp. of Am.*, 331 F.3d 1164, 1166 (10th Cir. 2003); *Yousef v. Reno*, 254 F.3d 1214, 1221-22 (10th Cir. 2001)). Accordingly, plaintiffs' proper course of action is to administratively exhaust all of their claims and then re-file their complaint, if appropriate, once administrative exhaustion is complete. Moreover, nothing prevents plaintiffs from filing separate complaints with regard to their distinct claims, so long as all of the claims brought in those complaints are administratively exhausted prior to plaintiffs initiating the claims.

IT IS THEREFORE ORDERED that plaintiffs' Motion to Alter or Amend Judgment (Doc. 40) is denied.

IT IS FURTHER ORDERED that plaintiff Brian McGoldrick's Motion to Reopen Case and/or Motion for Ruling (Doc. 42) is granted in part and denied in part as is set forth above. Specifically, plaintiff

---

requested both injunctive relief and monetary damages on this claim on behalf of all of the plaintiffs. Accordingly, plaintiffs' attempt to circumvent the total exhaustion requirement fails.

McGoldrick's Motion for Ruling is granted, and the court has entered its ruling on the Motion to Alter or Amend Judgment herein. Accordingly, plaintiff McGoldrick's Motion to Reopen Case is denied.

Dated this 2nd day of November 2005, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge